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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954.

No. 270

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

JOHN MARGEVICH,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

The Question.

The question presented is neither novel nor of federal character. On several occasions it has been adjudicated adversely to Petitioner's position. Succinctly stated, it is: Can a defendant in any personal injury action mitigate the measure of damages by requesting the court to instruct the jury in a personal injury action that the award is not subject to income tax?

It should be noted at the outset that there is no complaint that the jury was not correctly instructed on the measure of damages. In fact, Petitioner tacitly admits this to be true. Thus that which constitutes the criterion of damages is not an issue.

It is fundamental that in an action to recover damages under the Federal Employers' Liability Act common law elements of damages as recognized in the Federal Courts are the proper considerations. (*Vicksburg and M. R. Co.* v. *Putnam*, 118 U.S. 545, 554; Sutherland on Damages, 4th Ed., Vol. 5, Sec. 1331, P. 5088.)

Since Petitioner admits that such were employed here, authorities that compensation should not exceed the injuries suffered or those defining elements of damages in death actions under the Federal Employers' Liability Act have no pertinency whatsoever.

Summary of Argument.

In an action to recover damages for personal injuries, whether the award is tax exempt is entirely foreign to the issues. So long as the instructions define the elements of damages proper for the consideration of the jury—as it is admitted was done here—there can be no complaint. Income tax laws have nothing whatsoever to do with the definition of damages.

The assumption that jurors might consider income tax in computing damages is an element based on a premise at loggerheads with the foundation of trial by jury, namely, that the jury follows only that law as given by the court.

The question of income tax is one that concerns the individual and his government; a defendant tort feasor cannot employ an exemption in the income tax laws to mitigate damages.

What the individual will receive net from an award cannot justify an instruction concerning taxes. If that were so, the jury could be instructed on many matters foreign to the case, such as attorney's fees, court costs, etc.

ARGUMENT.

The question of income taxation is entirely foreign to any action to recover common law damages for personal injuries. The issue is not a federal question of substance; it is a pure common law question which has been decided adversely to petitioner's contention on multiple occasions.

Petitioner would invoke the jurisdiction of this court by stating that the question of whether in a personal injury action by employee a railroad company is entitled as a matter of law to have the jury instruct that whatever award the employee recovers is not subject to taxation. It is, however, fundamental as we have pointed out, that in any action for injuries by an employee under the Federal Employers' Liability Act the measure of damages is the same as that provided by the Federal common law. (See *Vicksburg and M. R. Co.* v. *Putnam,* 118 U.S. 545, 554. See Sutherland on Damages, 4th Ed., Vol. 5, Sec. 1331, P. 5088.)

The elements of damage are well delineated. And Petitioner's statement that "The court below decided the issue in a manner inconsistent with the basic principle that compensation in Federal Employers' Liability Act cases should equal, but not exceed, the extent of the injury (Pet. p. 9) demonstrates the want of jurisdiction here. It admits that the elements submitted to the jury were proper. In effect, it complains about the amount of the verdict. However, there was an affirmation of the verdict by the Appellate Court of Illinois. This constitutes a non-reviewable finding. (Chap. 110, Sec. 216(3)(b) Ill. Rev. Stats. 1951; *Gorczynski* v. *Nugent,* 402 Ill. 147, 151 83 N.E. 2d 495, 497; *Hecker* v. *I. C. R. R. Co.,* 231 Ill. 574, 577, 578, 83 N.E. 2d 456, 457, 458) And neither this court (*Fairmount Glass Works* v. *Fork Coal Co.,* 287 U.S. 474, 481, 485) nor the Illinois Supreme Court (*Goldberg* v. *Cap-*

itol Freight Lines, 382 Ill. 283, 289, 47 N.E. 2d 67, 71), which denied this Petitioner's petition for leave to appeal from the Illinois Appellate Court, is concerned with the amount of damages. Petitioner would suggest that perhaps the jury did not decide the case on the evidence and according to the court's instructions. It suggests many things *which the jury might have considered.* However, Petitioner's argument is contrary to the very fountainhead of trial by jury, namely, that the triers of the facts decide the case on the evidence and according to the court's instructions. Indeed, there is a presumption, as a matter of law, that the jury has thus conducted itself.

As this court had occasion to comment in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 62:

> "Courts should not assume that in determining those questions of negligence, juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this court, speaking through Mr. Justice Holmes, said: 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' *Aikens* v. *Wisconsin*, 195 U.S. 194, 206."

And here it is to be remembered that there is no complaint that the jury was not properly instructed on the measure of damages.

It is true, there are many things a jury or any group of human beings may have thought of. But if the courts were to indulge in such speculation to foreclose by instructions all possible avenues of thought, regardless of how foreign they might be to the issues of the case, the jury system would be emasculated.

Then, too, if the jury were to be instructed upon the question of income tax, improper subject matter would

be submitted for its consideration. As a matter of fact, as the cases hereinafter cited demonstrate, the courts have jealously guarded the injured against a tort feasor using this avenue. *Thus they say the gross earnings are the measure of damages and point out how the question of income tax is a matter between the individual's government and himself.* These cases Petitioner would attempt to avoid by stating that in holding evidence of income tax deductions is not proper in determining earnings already lost or to be lost in the future and are not decisive concerning whether a jury can be instructed upon the fact that the award is exempt from payment of income tax. But if, as the authorities hold, it is inadmissible to show tax deductions in computing even earnings to be lost in the future, how can one properly ask an instruction upon improper evidence. Or, as a law review article has stated,

> "If the jury is not permitted to make calculated income tax deductions on a plaintiff's future earnings in assessing that phase of the damages, what warrants the * * * ruling that juries must be instructed of the tax exempt status of the entire award?"[1]

The matter delineates itself to the query whether a defendant in a personal injury case can mitigate the element of damages by showing that the award is tax exempt. That such is the issue is well demonstrated by the language of the Annotator at Page 321, 9 A.L.R. 2d, wherein it is said:

> "While it is manifest that very generally the matter of income tax liability has not been taken into consideration in fixing the amount of damages for impairment of earning capacity, or in determining

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[1] Vol. 33, Boston U. L. R., 114, 115.

whether a particular award of such damages is excessive, there are surprisingly few cases actually dealing with the question whether income tax liability should be considered in fixing such damages?

"Where the question has arisen, in reported cases, the courts generally have been of the opinion that in fixing damages for impairment of earning capacity the fact that the damage award will be exempt from income tax, whereas if the awardee had not sustained the loss of earning capacity and had gone on to work and received the income forming the basis of such damage award, he would have become subject to income tax liability on such earnings, is not a matter to be taken into consideration and is no ground for diminishing the amount of damages for impairment of earning capacity." (Underlining ours.)

The Annotator then continues thus:

"The most complete discussion of the question considered in this annotation is found in *Billingham* v. *Hughes* (Eng) (1949) 1 K B 643, 9 A L R 2d 311—C A, in which the three judges of the Court of Appeals were agreed that in fixing the amount of damages to be awarded a doctor for impairment of his earning capacity, by reason of personal injuries caused by the negligence of the defendant, *the matter of income tax liability is not to be taken into consideration and, specifically, that the amount of damages based upon loss of earning capacity should not be reduced because the damage award would be exempt from income tax, even though, if the injury had not occurred, the plaintiff's future earnings from his profession would, as earned, become subject to liability for income tax. It was considered that income tax liability was a matter strictly between the plaintiff and the taxing authorities, in*

which the defendant tort feasor had no interest; that under the principle of restitutio in integrum the plaintiff was entitled to be put in the position in which he would have been vis a vis his patients, that is, to receive his fees in full, without regard to questions as to his ultimate liability to the taxing authorities; and that to take income tax liability into consideration would not only upset the long-continued practice of the courts not to do so in estimating damages but would also involve great difficulties in estimating the amount of tax which might accrue in the future in the case of any particular plaintiff. As expressed by Birkett, J., 'The amount of tax he might have to pay might differ from year to year; but with all these things the defendants certainly have nothing to do, and are equally certainly not entitled to say that, as wrong-doers, they should receive an abatement of the damages they ought to pay by deducting tax, solely for their benefit.' " (Italics ours.)

We invite the court's attention to this complete annotation.

Nor is this subject new to this Petitioner. See *Chicago & N. W. Ry.* v. *Curl* (8th Cir.), 178 Fed. 2d 497 (decided in 1950), where the court, on the basis of *Stokes* v. *United States* (2d Cir.), 144 F. 2d 82, 87, *Cole* v. *Chicago, St. P. M. & O. Ry. Co.*, D. C. 59 F. Supp. 443, 445, *Majestic* v. *Louisville & N. R. Co.* (6th Cir.), 147 F. 2d 621, 626), held that evidence concerning income taxes was not admissible, that gross earnings were the measure of damages, and that whatever deductions made or to be made in the future was not a proper consideration.

In addition to the foregoing authorities, see *Smith* v. *Penn. R. Co.*, 59 O. L. A. 282, 288, 99 N.E. 2d 501, *O'Donnell* v. *Great Northern Ry. Co.*, 109 F. Supp. 590, 591, and *Abrahamian* v. *Nickel Plate R. R. Co.*, 343 Ill. App. 352,

No. 450179 (Abstract only), 99 N.E. 2d 153, holding an instruction properly refused which referred to the question of income tax.

The Congressional Intent.

Petitioner states that since the Federal Employers' Liability Act was passed prior to the first income tax law and the income tax law has been amended since the passage of the Federal Employers' Liability Act, the income tax law or alterations in it should affect the Federal Employers' Liability Act. Let us dispose of this contention immediately.

In the first place, the income tax law is not a component part of the Federal Employers' Liability Act. One has nothing to do with the other. The only similarity between them is that they are both acts of Congress.

Secondly, this is an argument which should be addressed, not to the judicial branch, but rather to the legislative arm of the government.

Thirdly, this provision providing for exemption of an award for sickness and injuries was passed in 1918. (Title 26 U.S.C.A. 22(b)) It has been changed on numerous occasions since that date, as the annotation indicates. At no time has the substance of the law been changed, although the Federal Employers' Liability Act was, of course, in full force and effect. Moreover, the Federal Employers' Liability Act was amended in 1939. (Title 45 U.S.C.A. Sec. 51, et seq.) At that time, however, Congress, with full knowledge that the income tax exemption was on the statute books, did not change the measure of damages recoverable in actions under the Federal Employers' Liability Act.

The very language of the Internal Revenue Code makes it unmistakably clear that Congress, in excluding from gross income the proceeds of actions upon or settlements of claims for personal injury, acted for the benefit of the injured person, not for the benefit of the wrongdoer.

To permit a jury to consider the income tax exemption of the injured in assessing damages against his employer, who must be culpable on the basis of common law damages, is to permit the employer to employ the Internal Revenue Code, designed for the benefit of the injured, to mitigate the damages.

These considerations become more cogent when it is recalled that the Petitioner may deduct from its gross earnings every cent it pays to the injured plaintiff. According to the position taken by Petitioner, the will of Congress would not only be frustrated, but actually defied.

Then, too, there are, in addition to the federal decisions on this matter and apart from the intent of Congress, many fundamental reasons why the question of income tax should not be made part of the case.

First, the jury was correctly instructed on the measure of damages. They were likewise specifically told elements that they could not consider in awarding damages. How, then, can it be said that a jury might think about income tax? Indeed, it is well established that there would be no purpose in giving a jury instructions, if it is to be assumed that the jurors do not follow them. (*Wilkerson* v. *McCarthy*, 336 U. S. 53, 62.)

Secondly, if a court were to tell a jury that whatever sums are received by the plaintiff are free from income tax, it would be violating an axiomatic principle that the status of the parties is immaterial. The measure of damages is defined by certain well established principles.

These were properly set forth in the given instructions. What the plaintiff does with this money when he obtains it, whether he must pay a tax, whether it will make a plaintiff richer, or a poor plaintiff a man of substance is no concern to the jury or the defendant. If such an instruction were proper, the converse must likewise be true, namely, that the jury should be instructed that whatever the corporation would pay the injured, it could be deducted from its income tax payments, since its operating profits might thus tend to be less. "Evidently the effect and purpose is to diminish whatever compensation might be granted." (*)

But why should a tort feasor be allowed to mitigate damages by virtue of the fact that the injured has to pay income tax on his earnings or that what he receives as an award is free from taxation? The tort feasor has nothing to do with the question of taxes—a question between the plaintiff and his government. Why should the damages the tort feasor has brought be abated at the loss of the individual? Certainly, if the injured had an accident policy which paid him one thousand dollars for each week of his disability, the defendant could not show it in mitigation, nor could the defendant show that the injured medical expenses were paid by an accident policy. (*Davidson* v. *Loomis*, 282 Ill. App. 515, 518, 519.) Nor could the fact that an injured railroad employee was receiving a pension be admitted in evidence. *Chgo. G. W. Ry.* v. *Peeler* (8th Cir.), 140 F. 2d 865; *McCarthy* v. *Palmer* (2nd Cir.), 113 F. 2d 721; *Detroit, T. & I. R. Co.* v. *Pitzer*, 42 O.L.A. 494, 61 N.E. 2d 93; *King* v. *Denver & R. G. W. R. Co.*, 116 Ut. 488, 503, 211 Pac. 2d 833.

(*) Vol. 33 Boston U. L. R., 114, 115.

Again, to allow the question of income tax to be gone into could involve the trial of many matters outside the issues raised. Thus there may well be an appeal, and during the pendency of that appeal, the income tax laws could be changed so that by the time the injured receives the payment of his award, it would be taxable. All of us are familiar with the retroactive character of our present tax laws.

Lastly, the plaintiff is required to pay income tax on the interest the judgment earns—a circumstance which well illustrates the weakness of the petitioner's argument.

Dempsey v. *Thompson*

Petitioner relies upon the decision of a Missouri Supreme Court, *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W. 2d 42. There the trial court refused to give the tendered instruction on the exemption of award from income taxation. But the judgment for plaintiff was affirmed. Accordingly, this language was mere dictum. There is more, however. It held no inquiry can be made of a witness concerning exemption from taxation. It likewise held that a defendant should not be permitted to argue the question of income tax to the jury, and that the measure of damages was gross earnings, and not earnings after income tax deductions had been made. It then concluded that defendant was entitled to an instruction that any amount awarded the plaintiff was not subject to income taxation. But even this anomalous case does not aid petitioner. *It held that it would be improper to instruct the jury that whatever income the verdict bore was tax free because such would be "speculating"* (p. 46 S.W. 2d). Here petitioner's refused instruction went into the question of taxation upon

the amounts of any dividends, interest, gain or profit from the amount of the award. (App. p. 26 Pet.) Moreover, the Appellate Court pointed out the distinction between the instruction suggested by the court in the *Dempsey* case, supra, and the one tendered in this case, and stated (App. p. 26 Pet.)

> "We infer from a study of the *Dempsey* case that the refused instruction there did not contain the words following the word 'although' in the instant instruction. The instruction in that case and this are not the same, and the question before us is therefore different."

Then, too, the same Missouri Supreme Court two years earlier, in the case of *Hilton* v. *Thompson*, 360 Mo. 177, 185, 227 S.W. 2d 675, held a tendered income tax instruction properly refused, pointing out (p. 681 of S.W. 2d):

> "The jury was properly instructed on the factors to be considered in fixing the amount of respondent's damages and it would not have been proper to inject into the case an extraneous issue regarding the tax exempt status of the damages which might be awarded."

"With due deference and respect to the Missouri Supreme Court, it is submitted that their novel ruling is inconsistent with the instant opinion itself as well as the several prior cases dealing with the connected topic. A mandatory instruction to a jury that any award is tax exempt not only invites conjecture in arriving at the particular award, but clearly prejudices the plaintiff's cause."[1]

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[1] Vol. 33 Boston U.L.R. 116.

Hall v. *Chicago & North Western Ry. Co.*

Hall v. *Chicago & North Western Ry. Co.* is not properly described in the footnote at p. 13 of the Petition. There the defendant argued the nontaxability of the award. The trial court sustained the objection. Plaintiff's motion for a new trial was allowed. But the Appellate Court of Illinois, First District, First Division, in reversing this order of the trial judge, held it proper to make such argument, relying on *Dempsey* v. *Thompson, supra,* which *held that there could be no argument by counsel concerning income tax.* Thus this was an interlocutory order by an intermediate court. Petition for leave to appeal could not be obtained until a final judgment was entered. Plaintiff, in accord with the opinion of the Appellate Court in the interlocutory order (349 Ill. App. 175, 110 N.E. 654)[4] had the judgment in his favor restored. There was an appeal by both

[4] The opinion in *Hall* v. *Chicago & North Western Railway Co.,* 349 Ill. App. 175, 110 N.E. 654, is analyzed in Vol. 21, August 1953, No. 1, pp. 156, 157, University of Chicago Law Review, and the note is entitled: "Propriety of Comment on Non-Taxability of Personal Injury Verdicts." There it is pointed out: (1) The Appellate Court was primarily concerned with the protection of the defendant (2) The Appellate Court reasoned that jurors might erroneously assume that an award was taxable; (3) The Appellate Court ignored the possibility that the plaintiff might be prejudiced by such comment; (4) The decision is based upon the assumption that the jury will disregard the court's instructions, whereas the law is well established that a court might justifiably rely on the presumption that the jury adheres to its instructions; (5) Both parties are adequately protected by proper instructions concerning the measure of damages without reference to the taxability of the award.

parties to the Appellate Court, and the same three judges reversed the judgment in plaintiff's favor. (*Hall* v. *Chicago & North Western Ry. Co.*, 1 Ill. App. 2d 552, 118 N.E. 2d 29.) Then for the first time plaintiff had an opportunity to appeal from the order of the Appellate Court reversing the trial court's decision granting plaintiff a new trial and also from its order reversing the judgment in his favor.

An appeal to the Illinois Supreme Court from the Illinois Appellate Court is not a matter of right but is accomplished through petition for leave to appeal. (Chap. 110, Sec. 529.32, Ill. Rev. Statutes 1953) *The Illinois Supreme Court on May* 18, 1954, *allowed Hall's petition for leave to appeal, both from the order of the Appellate Court, in which it held it proper to argue income tax exemption* (349 *Ill. App.* 175, 110 N.E. 654) *and also from the judgment of the Appellate Court setting aside a verdict of the jury in favor of the plaintiff.* (1 *Ill. App.* 2d 552, 118 *N.E.* 2d 29.) The cause was docketed in the Supreme Court of Illinois under No. 33264.

On the very same day, namely, May 18, 1954, that Hall's petition for leave to appeal was allowed, the Illinois Supreme Court denied this Petitioner's petition for leave to appeal from the judgment of the Illinois Appellate Court in Cause No. 33203 of the Supreme Court.

Accordingly, neither of the *Hall* opinions is final, even in Illinois. Since the *Hall* case (349 Ill. App. 175, 110 N.E. 654) is an interlocutory order by an intermediate court which is now being reviewed, and *since it does not involve an instruction on the question of income tax,* we shall not dwell at length upon it. We might say that *Dempsey* v. *Thompson, supra,* upon which it solely relied, specifically holds that it is improper to make such argument.

The Measure of Damages.

Petitioner would seek to distort the rule that the worth of future earnings must be reduced to their present value so as to justify this instruction. Of course, there is no complaint that the jury was not properly instructed. The very fallaciousness of Petitioner's argument becomes obvious when the question is stated thus: *Can the defendant in a personal injury case show what the injured actually receives out of the award?* If that be so, then would it not be proper to call the jury's attention to the fact that attorney's fees must be paid out of any judgment? If this rationalization be correct, why then not inform the jury that the costs of litigation are not included in the award returned by them.

And how, we ask, can Petitioner square this argument with that line of authorities holding that gross wages, not wages paid or to be paid after income tax deductions, are the measure of damages?

Lastly, we are gven some language from *Wetherbee* v. *E., J. & E. Ry. Co.* (7th Cir.), 191 F. 2d 302, concerning amounts awarded in personal injury cases. In that case, the court pointed out that it would not review a judgment for excessiveness. (p. 309.) However, Petitioner in an Illinois court not only has the benefit of the ability of the trial judge to order remittitur on a motion for a new trial, but is further permitted to question damages in the Illinois Appellate Court. (Chap. 110, Sec. 216, Par. 92, Ill. Rev. Statutes, 1953; *Corcoran* v. *City of Chicago*, 73 Ill. 567, 580, 27 N.E. (2d) 451; *Goodrich* v. *Sprague*, 385 Ill. 200, 202, 203, 208, 32 N.E. 2d 897.

Conclusion.

The question Petitioner seeks to raise has already been properly adjudicated by the courts. Moreover, it is a common law matter without specific peculiarity to the Federal Employers' Liability Act.

Certiorari here would serve no function in the administration of justice. It is respectfully submitted that the Petition for Writ of Certiorari to the judgment of the Appellate Court of the State of Illinois, First District, be denied.

Respectfully submitted,

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